APPEAL NO. 020682
FILED APRIL 24, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 13, 2002. The hearing officer resolved the disputed issues by concluding that the appellant (claimant) did not sustain a compensable injury on _____; that the claimed injury occurred while the claimant was in a state of intoxication; that the respondent (carrier) did specifically contest the compensability of the claimed injury; and that because there is no compensable injury there can be no resulting disability. The claimant appealed, arguing that the hearing officer's decision is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust, and that there was insufficient evidence of intoxication to shift the burden to the claimant to show that he had the normal use of his mental and physical faculties. The carrier replied, arguing that the decision should be affirmed.

DECISION

Affirmed in part and reversed and rendered in part.

The claimant had the burden of proving that he sustained a compensable injury as claimed. Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ). Whether he did so was a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 93449, decided July 21, 1993. Section 410.165(a) provides that the hearing officer is the sole judge of the weight and credibility of the evidence. She was not persuaded by the claimant's evidence that he met his burden of proof and resolved the credibility question against the claimant. In her statement of the evidence, the hearing officer specifically stated that based on the complete record developed at the CCH, it is clear that the claimant was not credible and that he did not injure his lower back, as claimed, on _____. We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Company, 715 S.W.2d 629, 635 (Tex. 1986). Applying this standard of review to the record of this case, we find the evidence sufficient to support the determination of the hearing officer that the claimant did not sustain a compensable injury.

An employee is presumed sober at the time of an injury. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. However, a carrier rebuts the presumption of sobriety if it presents "probative evidence" of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. March v. Victoria Lloyds Insurance Co, 773 S.W.2d 785 (Tex. App.-Fort Worth 1989, writ dism'd). Once the carrier has rebutted the presumption, the employee has the burden of proving he was not intoxicated at the time of the injury. *Id.* The claimant argues that the fact the drug screen was performed six days after the date of the injury and that no expert testimony was provided is not enough to shift the burden to the claimant to prove that he

was not intoxicated at the time of injury. The claimant testified that on the day of the injury, _____, he had not smoked marijuana but that on October 14, 2001, he smoked a marijuana cigarette laced with cocaine to help with his pain. It was undisputed that the drug screen was performed six days after the date of injury. The carrier did not present any evidence other than the drug screen, which indicated two positive readings. The Appeals Panel has held that a carrier need not present expert medical evidence for the burden of proof to shift to the employee. Texas Workers' Compensation Commission Appeal No. 982899, decided January 28, 1999. However, in this case, given the length of time between the claimed injury and the drug screen it is against the great weight and preponderance of the evidence to conclude that the reported results alone, without explanation, are sufficient to rebut the presumption of sobriety and shift the burden to the employee to prove he was not intoxicated at the time of the injury. The hearing officer's determination that the claimed injury occurred while the claimant was in a state of intoxication is reversed.

There is sufficient evidence to support the determination of the hearing officer that the carrier specifically contested the compensability of the claimed injury. The Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) specifically states that the "carrier disputes the existence of a work related injury [and] disputes an injury within the course [and] scope of employment."

Given our affirmance of the hearing officer's determination that the claimant did not sustain a compensable injury, we likewise affirm her determination that the claimant did not have disability. By definition, the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

We affirm that part of the hearing officer's decision that determined the claimant did not sustain a compensable injury, that determined there was no disability, and that determined the carrier specifically contested the compensability of the claimed _____, injury. Having determined that the finding shifting the burden of proof to the claimant to prove he was not intoxicated at the time of the injury is against the great weight and preponderance of the evidence, we render a decision that the carrier did not provide sufficient evidence to rebut the presumption of sobriety. This reversal, however, does not change the ultimate outcome that the carrier is not liable for benefits.

The true corporate name of the insurance carrier is **GREAT AMERICAN ALLIANCE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

C T CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

Thomas A. Knapp
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

CONCURRING OPINION:

I concur in the result. I write separately because I feel that the reversal of the hearing officer on the sufficiency of the evidence to shift the burden to the claimant to prove sobriety at the time of the injury warrants more discussion of supporting authority. In Texas Workers' Compensation Commission Appeal No. 92173, decided June 15, 1992, the employee submitted a specimen for urinalysis on _____; was injured on _____; and submitted another specimen on _____. Both specimens proved positive for the active ingredient of marijuana. The hearing officer determined the intoxication issue in favor of the claimant. In discussing this issue, our decision stated that we agreed with the carrier "that the lab tests results raised the exception thus requiring [the claimant] to go forward with evidence to prove by a preponderance of the evidence that he was not in a 'state of intoxication.'" Our decision cited Texas law references to the rebuttal of presumptions, such as the presumption that a claimant is presumed to have been sober at the time of the injury, and the quantum of evidence necessary to rebut a presumption. In Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991, the Appeals Panel referred to raising the defense of intoxication at the time of injury with "probative evidence." In Texas Workers' Compensation Commission Appeal No. 92148, decided May 29, 1992, the Appeals Panel stated that "[w]hen evidence is presented that raises an issue that an employee was intoxicated at the time of his injury, the claimant then has the burden of proving that he was not intoxicated. [Citations omitted.] [Emphasis supplied.]" In Appeal No. 92173, *supra*, we stated that "[we] have referred to such evidence as probative evidence, that is, evidence that has some value in establishing

a factual matter as opposed to evidence that amounts to no more than speculation or which is a mere scintilla." We stated that our decisions have not required carriers to present scientific or expert evidence in order to raise a fact question concerning intoxication but went on to observe that "the more persuasive the carrier's evidence relied on to raise the intoxication exception, the more difficult will be the burden of the employee to prove the absence of intoxication to the satisfaction of the fact finder." *See, also*, Texas Workers' Compensation Commission Appeal No. 94673, decided July 12, 1994, and Texas Workers' Compensation Commission Appeal No. 950656, decided June 9, 1995, for additional discussion of the quantum of evidence necessary to raise the defense of intoxication at the time of the injury and shift the burden to the claimant to prove sobriety at that time.

In my opinion, the failure of the evidence to rebut the presumption of sobriety is not simply a matter of noting the number of days that passed after the date of injury before the body fluid specimen was collected, be it one, two, four, six days or more, or merely noting the amount of the intoxicating substance exceeding the test cutoff amount. Rather, all the evidence bearing on the question of intoxication, including the lack of evidence, should be considered, such as expert reports or testimony, if any, testimony of coworkers and supervisors, if any, and unusual aspects of the accident itself, if any. No simplistic formula consisting of just the number of days between the injury and the drug testing should suffice. In the case before us, noting the number of days that passed between the time of the injury and the testing and the absence of any other evidence tending to show intoxication at the time of the injury, I can concur with the result reached by the majority. The case relied on by the hearing officer, Texas Workers' Compensation Commission Appeal No. 941099, decided September 30, 1994, is readily distinguishable in that it involved a drug test performed on the day of the accident and the testimony of a nurse who saw the employee after the accident.

Philip F. O'Neill
Appeals Judge